A

NG CHEE CHOY

v.

BETTER SYMBOL SDN BHD & ORS

B

HIGH COURT MALAYA, IPOH
HARMINDAR SINGH DHALIWAL J
[CIVIL APPEAL NO: 22NCVC-202-08-2012]
4 APRIL 2013

C ***CIVIL PROCEDURE:*** *Rules of court - Non-compliance - Suit premised on s. 181 Companies Act 1965 - Commencement of suit by way of writ of summons - Rules of Court 2012, O. 88 r. 2 - Mandatory provision - Whether action should have been commenced by originating summons - Whether defect amounted to mere irregularity -*
D *Whether abuse of court process - Whether action ought to be struck out*

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Suit premised on s. 181 Companies Act 1965 - Rules of Court 2012, O. 88 r. 2 - Mandatory provision - Non-compliance of - Whether action*
E *should have been commenced by originating summons - Whether defect amounted to mere irregularity - Whether abuse of court process - Whether action ought to be struck out*

COMPANY LAW: *Oppression - Relief - Companies Act 1965, s. 181 - Suit commenced by way of writ - Rules of Court 2012, O. 88 r. 2 -*
F *Mandatory provision - Non-compliance of - Whether action should have been commenced by originating summons - Whether defect amounted to mere irregularity - Whether abuse of court process - Whether action ought to be struck out*

G ***COMPANY LAW:*** *Oppression - Relief - Hybrid action - Whether plaintiff prayed for winding-up of company and also sought relief under s. 181 Companies Act 1965 - Whether suit was combination of ss. 181 & 218 Companies Act 1965 - Whether existence of hybrid action proven*

H

The plaintiff, a director of the first defendant, had filed an action praying for, *inter alia*, that the first defendant be wound-up and in the alternative, for orders as provided under s. 181(2)(a) and/or (b) of the Companies Act 1965 ('the Act'). *Vide* encl. 5, the
I defendants filed an application to strike out the plaintiff's claim on

the ground that the suit was an abuse of court process. To support this contention, the defendants argued that (i) there was a substantial non-compliance of the court rules as the action was commenced by way of writ; and (ii) a hybrid action was commenced whereby the plaintiff prayed for the winding-up of the company and also sought relief under s. 181 of the Act. The defendants contended that by filing a writ action instead of an originating summons, there had been a substantial non-compliance of the Rules.

Held (allowing defendants' application *vide* encl. 5; striking out plaintiff's suit):

(1) The Rules of Court 2012 ('ROC') provides two modes for the commencement of proceedings, *ie*, either by writ or originating summons by virtue of O. 5 r. 1 of the ROC. The ROC provides that proceedings in which a substantial dispute of fact is likely to arise shall be begun by writ. On the other hand, proceedings by which an application is to be made to court or a judge thereof under any written law shall commence by way of originating summons. (para 4)

(2) The plaintiff was clearly praying for remedies provided in the Act and in particular, s. 181 of the Act. Hence, the plaintiff ought to have commenced the proceedings as mandated by O. 88 r. 2 of the ROC. Order 88 r. 2 of the ROC is a mandatory provision which requires proceedings under the Act to be commenced by originating summons. Being a specific provision relating to the commencement of proceedings, O. 88 r. 2 of the ROC would override the general provisions set out in O. 5 r. 2 ROC in accordance with the legal maxim *generalia specialibus non derogant.* (paras 7, 10 & 15)

(3) Even when there is some conflict as to the facts, O. 38 r. 2(2) of the ROC allows the court, on the application of any party, to order the attendance for cross-examination of the person making any affidavit in any cause or matter begun by originating summons or on any application made by notice of application. In this way, O. 38 r. 2(2) of the ROC complements O. 88 r. 2 of the ROC. (para 11)

(4) By filing the writ action, there had been substantial non-compliance with the ROC. This defect could not amount to a mere irregularity as the proceedings under the writ action will be different in that there will be, *inter alia*, less economical process of filing pleadings, bundle of documents and then preparing for a trial by calling witnesses. With there being an abuse of court process, the plaintiff's action must be struck off. (para 15)

(5) The plaintiff's action was solely premised on the defendants' oppressive conduct which was strictly based on s. 181 of the Act. Therefore, it was not the case where the relief sought for, including the winding-up of the first defendant, was a combination of ss. 181 and 218 of the Act. Further, this was not the kind of hybrid action which was present in the case of *Lai Kim Loi v. Datuk Lai Fook Kim & Co.* (para 17)

Case(s) referred to:

Lai Kim Loi v. Datuk Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

Mohamed Ismail v. Tan Sri Haji Osman Saat & Ors [1982] CLJ 553; [1982] CLJ (Rep) 581 HC ***(refd)***

Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor [1975] 1 LNS 178 FC ***(refd)***

Yap Suat Tee & Ors v. Collector of Land Revenue [1968] 1 LNS 176 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181(2)(a), (b), 217, 218, 372

Courts of Judicature Act 1964, s. 372

Rules of the High Court 1980, O. 88 r. 5(h)

Rules of Court 2012, O. 5 rr. 1, 2, 3, 4, O. 18 r. 19(1)(d), O. 28 r. 8, O. 38 r. 2(2), O. 88 rr. 2, 5

For the plaintiff - Shan Theivanthiran; M/s Thevin Chandran & Assocs

For the defendants - Andrew Soong Tze Toong; M/s BH Koh, Soong, Zarin & Partners

Reported by Kumitha Abd Majid

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] By way of encl. 5, the defendants are seeking to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(1)(d) Rules of Court 2012 ("ROC 2012") on the ground of abuse of the court process.

[2] The background facts leading to the application can be stated as follows. The plaintiff is a director of the first defendant company, together with the second defendant. The third defendant was subsequently made a director of the first defendant as well. The plaintiff has now filed this action alleging that the second defendant had acted against the interests of the plaintiff and the first defendant company, the particulars of which were set out in the statement of claim. The plaintiff is seeking for an order that the first defendant be wound-up and a liquidator appointed and in the alternative, for orders as provided under s. 181(2)(a) and/or (b) Companies Act 1965 ("CA 1965") as the court may deem fit as well as costs.

[3] The defendants have now filed the instant application in encl. 5 to strike out the claim on the ground that the suit is an abuse of court process. Two grounds for abuse of court process were raised. It was argued that:

(a) commencing the action by way of writ in an action based on the CA 1965 is a substantial non-compliance of the court rules, and

(b) commencing a hybrid action, whereby the plaintiff prayed for the winding-up of the company and also sought relief under s. 181 of the CA 1965, is not allowed.

[4] On the first ground, it is noteworthy that the new ROC 2012 provides for only two modes for the commencement of proceedings in court, namely, either by writ or origination summons (O. 5 r. 1, ROC 2012). The rules provide that proceedings in which a substantial dispute of fact is likely to arise shall be begun by writ (O. 5 r. 2, ROC 2012). Proceedings by which an application is to be made to the court or a judge thereof under any written law shall be begun by originating summons (O. 5 r. 3, ROC 2012).

[5] Proceedings are also appropriate to be begun by originating summons in which:

(a) the sole or principal question at issue is or is likely to be one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract, or other document, or any other question of law; or

(b) there is unlikely to be any substantial dispute of fact (O. 5 r. 4, ROC 2012).

[6] It is also provided in O. 28 r. 8, ROC 2012 that where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the course or matter had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings.

[7] In the instant action, the plaintiff is clearly praying for remedies provided in the CA 1965 and in particular s. 181 CA 1965 for the first defendant company to be wound up. Now O. 88 ROC 2012, which deals with the CA 1965, has provided in O. 88 r. 2 that except for the proceedings specified in Appendix C relating to the winding up of companies and capital reductions under the CA 1965, proceedings under the CA 1965 shall be commenced by originating summons. The defendants therefore contend that by filing a writ action instead of an originating summons, there has been substantial non-compliance of the rules.

[8] The plaintiff, in response, argued that a writ action was filed as it was anticipated that triable issues would be raised. Even assuming that an originating summons had been filed, it would eventually have been converted to a writ action pursuant to O. 28 r. 8 of the ROC 2012. The plaintiff therefore contends that time and costs have been saved by filing a writ action instead of an originating summons.

[9] The plaintiff further submitted that in any event the filing of the writ action instead of an originating summons was a mere irregularity that can be cured. Relying on the cases of *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 1 LNS 178; [1975] 2 MLJ 188, *Yap Suat Tee & Ors v. Collector of Land Revenue* [1968] 1 LNS 176; [1968] MLJ 306 and *Mohamed Ismail v. Tan Sri Haji Osman Saat & Ors* [1982] CLJ 553; [1982] CLJ (Rep) 581; [1982] 2 MLJ 133, the plaintiff submitted that no prejudice has been caused to the defendants by the adoption of the writ procedure since the defendants have been given an opportunity to defend the action and are being heard on it.

[10] Having given the matter anxious consideration, I have come to the view that the plaintiff's submissions are not persuasive. It is significant that O. 88 r. 2, ROC 2012 is a mandatory provision requiring proceedings under the CA 1965 to be commenced by originating summons. The rules committee would have taken the view that matters relating to the CA 1965 ought to be disposed of quickly and hence the requirement for such proceedings to be commenced by originating summons instead of the more cumbersome and time-consuming and lengthy writ procedure. Being a specific provision relating to the commencement of proceedings, O. 88 r. 2, ROC 2012 would override the general provisions set out in O. 5 r. 2, ROC 2012 in accordance with the legal maxim *generalia specialibus non derogant* (see *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405 FC).

[11] Furthermore, it appears to have been overlooked by the plaintiff that even when there is some conflict as to the facts, O. 38 r. 2(2), ROC 2012 allows the court on the application of any party, to order the attendance for cross-examination of the person making any affidavit in any cause or matter begun by originating summons or on any application made by notice of application. In this way, O. 38 r. 2(2), ROC 2012 complements O. 88 r. 2, ROC 2012. Only in the unlikely event that proceedings cannot be fairly disposed of through cross-examination of deponents of affidavits can the parties then resort to convert the originating process to a writ action pursuant to O. 28 r. 8, ROC 2012.

[12] It must also be observed that the defendants, through the submission of counsel, have conceded that the crux of the allegations against the defendants is oppression only. This can also

be gathered by what is stated in the statement of claim. In view of the oppressive conduct of the defendants, the particulars of which have been extensively set out in the statement of claim, the plaintiff has sought for the first defendant company to be wound-up pursuant to the provision set out in s. 181 CA 1965.

[13] Now in the case of an application to wind-up a company pursuant to s. 181 of the CA 1965, the old Rules of the High Court 1980 ("RHC 1980") in the form of O. 88 r. 5(h) provided that applications under s. 181 of the CA 1965 for relief in cases of oppression must be made by petition. This provision no longer exists in the new ROC 2012 as the old O. 88 r 5 has been deleted in keeping with the objective of having only two modes of originating process. It must have been the intention of the rules committee to replace the petition with another simplified originating process in the form of an originating summons where only affidavits are required. They cannot have intended that the writ procedure will replace the petition.

[14] Now of course the rules committee has provided an exception in appendix C for proceedings relating to the winding-up of companies and capital reduction under the CA 1965. There is an obvious reason for this. s. 217 CA 1965, unlike s. 181 of the CA 1965, specifically provides for winding-up of a company to be commenced by petition. Unlike the case of winding-up proceedings under s. 181 of the CA 1965, proceedings for winding up under ss. 217, 218 of the CA 1965 will attract the specific procedure for the winding-up of companies in the form of the Companies (Winding-Up) Rules 1972, which rules are also made by the rules committee constituted under the Courts of Judicature Act 1964 and in execution of the powers conferred by s. 372 CA 1965.

[15] In the circumstances, and for the reasons stated, the plaintiff ought to have commenced proceedings as mandated by O. 88 r. 2, ROC 2012. By filing the writ action, it must be concluded that there has been substantial non-compliance with the ROC 2012. This defect cannot amount to a mere irregularity as the proceedings under the writ action will be different in that there will be the less expedient and less economical process of filing pleadings, filing bundle of documents and then preparing for a trial by calling witnesses. With there being an abuse of court process, the plaintiff's action must be struck off.

[16] For the sake of completeness, I come to the second issue of the plaintiff commencing a hybrid action. The gist of the defendants' complaint is that the plaintiff here is attempting to initiate actions under both ss. 181 and 218 of the CA 1965. They rely on the Supreme Court decision in *Lai Kim Loi v. Datuk Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61; where it was held that a hybrid petition purporting to have been presented under two different sections of the CA 1965 is not in accordance with the provisions of the CA 1965. In that case, the Supreme Court affirmed the decision of the High Court which had struck off the petition of the appellant on the ground that the petition was wrong in form as it attempted to roll up a petition under s. 218 with a petition under s. 181 of the CA 1965.

[17] In the instant case, however, a perusal of the statement of claim shows that the action is premised solely on oppressive conduct of the defendants and, as conceded by the plaintiff, the claim is based strictly on s. 181 of the CA. It is therefore not the case where the relief sought for, including the winding-up of the first defendant company, is a combination of ss. 181 and 218 of the CA 1965 as the defendants are contending. In the circumstances, I do not think it is the kind of hybrid action that was presented in the case of *Lai Kim Loi* and accordingly this contention has no merit.

[18] In the upshot, since there was substantial non-compliance of the rules in that the wrong mode of commencement of proceedings was adopted by the plaintiff, the plaintiff's suit is an abuse of the court process and ought to be struck out. Accordingly, an order in terms of the application in encl. (5) is granted with costs assessed at RM5,000.

[19] Lastly, another suit No. 22NCVC-201-08/2012 was also filed by the plaintiff against a different company but with the same directors and with a similar cause of action. The same issues were canvassed before the court where a similar application in encl. 5 in that suit was filed to strike out the plaintiff's writ and statement of claim. For the same reasons, order in terms of the application in encl. 5 was also granted with costs assessed at RM5,000.